BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUBEN M. URBANO	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 1,008,817 &
	)	1,008,818
KOCH-GLITSCH, L.P.	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the January 23, 2008, review and modification Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on May 16, 2008. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that the issue of whether claimant had a general bodily disability or four scheduled injuries was a past fact that existed at the time the ALJ's Award was decided on September 3, 2004, and affirmed by the Board on March 31, 2005. The ALJ then concluded that the doctrine of res judicata applied and denied respondent's application for review and modification of the Award.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requests the Board find its Application for Review and Modification is not barred by the doctrine of res judicata, that claimant's award is excessive in light of the decision of the Kansas Supreme Court in *Casco*,[1] that there has been an overpayment in benefits, and that claimant's award has been redeemed. Respondent argues that the ALJ erred in holding that the issue of the nature of claimant's disability is res judicata and asserts that K.S.A. 44-528 provides for review and modification if an award is excessive

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (2007).

or inadequate. Respondent contends that the award in this case is excessive and should be modified to find that claimant is entitled to four scheduled injuries. Respondent argues that claimant's substantive rights to compensation under the Workers Compensation Act have not been altered. But the procedural method by which his benefits are to be calculated has been altered. Citing several post-*Casco* Board decisions, respondent asserts that regardless of whether the setting is review and modification or merely review of the original Award, the analysis of claimant's entitlement to benefits pursuant to *Casco* is required.

Claimant asserts that at the time the Award was entered in this case, claimant's injuries were treated as unscheduled injuries under K.S.A. 44-510e rather than scheduled injuries under K.S.A. 44-510d. Claimant further argues that in retroactively trying to apply *Casco* to the present case, respondent is challenging the nature and extent of claimant's disability at the time the case was previously litigated, which was a question of fact. And that finding of fact is subject to res judicata. Claimant next argues that the doctrine of the "law of the case" should apply. He argues that once a finding of fact is established and the opportunity to appeal that decision has been exhausted, the court will not again decide that fact. Claimant also contends that respondent cannot use K.S.A. 44-528 as a means to challenge payments already made and, at most, respondent can only seek reimbursement for payments made during the six-month period before filing the application for review and modification.

The issue for the Board's review is: Should the award in this case granting claimant permanent partial disability compensation based upon a general body disability and work disability be reduced to four scheduled injuries pursuant to *Casco*?

FINDINGS OF FACT

Claimant was injured out of and in the course of his employment with respondent when he developed problems with his bilateral upper extremities and his bilateral lower extremities. An Award was entered on September 3, 2004, in which the ALJ found that claimant was entitled to an 84 percent work disability. Respondent appealed this Award to the Board on the issues of nature and extent of disability and whether the claimant suffered personal injury by accident arising out of and in the course of employment. The issue of whole body versus scheduled injuries was not appealed. In its Order of March 31, 2005, the Board affirmed the ALJ's determination that claimant suffered injury to his bilateral upper and lower extremities as a result of his repetitive work activities but modified the percentage of work disability to which claimant was entitled. The Board's Order was not appealed to the Kansas Court of Appeals.

On March 23, 2007, the Kansas Supreme Court entered its opinion in *Casco*, in which it held that scheduled injuries are the general rule and that injuries to parallel

extremities are treated as two scheduled injuries rather than an injury to the body as a whole. Thereafter, respondent filed an Application for Review and Modification. In its brief to the ALJ, respondent cited *Casco* and argued that claimant's Award is excessive because he is no longer entitled to work disability. Respondent requested that the Award be modified to find that claimant is entitled to four scheduled injuries, *i.e.*, two scheduled injuries at 10 percent impairment of function for each upper extremity, one scheduled injury at 9 percent functional impairment to the right lower extremity, and one scheduled injury at 11 percent functional impairment to the left lower extremity. Respondent also claimed that there has been an overpayment in benefits to claimant.

Claimant argued that respondent's Application for Review and Modification should be denied, claiming res judicata and the law of the case. Claimant further argues that respondent could not use K.S.A. 44-528 as a means to challenge payments already made.

The ALJ found that the doctrine of res judicata applied and denied respondent's Application for Review and Modification.

PRINCIPLES OF LAW

In *Casco*,[2] the Kansas Supreme Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.

[2] *Id.*, Syl. ¶¶ 7, 8, 9, 10, 11.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.

K.S.A. 44-510c(a)(2) requires that the disability result from a single injury and that condition may be satisfied by the application of the secondary injury rule.

K.S.A. 44-528 states in part:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
>
> . . . .
>
> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Review and modification, however, is not available to relitigate all issues. In *Randall*,[3] the Kansas Supreme Court held that res judicata applies to foreclose "a finding of a past fact which existed at the time of the original hearing."

> This is not necessarily true of findings relating to the extent of claimant's disability. The extent of a claimant's disability resulting from an accidental injury, where the causal connection is established, at any given time must be based on evidence of the claimant's condition at that particular time.[4]

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[3] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973).

[4] *Id.* at 396-97.

In *Morris*,[5] the Kansas Court of Appeals stated:

> There is no doubt . . . that the purpose of the modification and review statute was to save both the employer and the employee from original awards of compensation that might later prove unjust because of a change for the worse or better in a particular claimant's condition. [Citations omitted.]

In *Gile*,[6] the Kansas Supreme Court stated:

> Any modification is based on the existence of new facts, a changed condition of the workman's capacity, which renders the former award either excessive or inadequate [citation omitted]. The burden of proving the changed condition of the claimant is upon the party asserting it. [Citation omitted.]

In *Collier*,[7] the Kansas Supreme Court stated:

> The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:
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> > "The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts."
> > . . . .
>
> The cases stating this rule are legion in number, and the rule has been applied in many Kansas cases.

In *Finical*,[8] the Kansas Supreme Court stated: "We repeatedly have held that when an appealable order is not appealed it becomes the law of the case."

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[5] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979)

[6] *Gile v. Associated Co.*, 223 Kan. 739, 740-41, 576 P.2d 663 (1978).

[7] *State v. Collier*, 263 Kan. 629, 631, 952 P.2d 1326 (1998).

[8] *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

ANALYSIS

Although written in the disjunctive, the primary purpose of K.S.A. 44-528, the review and modification statute, is to permit awards to be reviewed and, if appropriate, modified when, due to a change in a claimant's physical condition or circumstances, *i.e.*, employment status or earnings, the original award has become either inadequate or excessive. In this case, there is no claim that claimant's condition or circumstances have changed. The only change is in how the applicable statutes are being interpreted by the Kansas Supreme Court.

In *Casco*, the Supreme Court clarified prior interpretations of the Kansas Workers Compensation Act and ruled bilateral parallel extremity injuries should be compensated as separate scheduled injuries and not as injuries to the body as a whole. The law has not changed, but the court's interpretation of the law as it existed on the date of claimant's accident has changed since the entry of the ALJ's Award in this case. Nevertheless, the issue of whether claimant's injuries should be compensated as separate scheduled injuries or as a general body disability was decided in the original Award of September 3, 2004. That Award was appealed to the Board, which modified the amount of work disability to which claimant was eligible but affirmed the Award's finding concerning the issue of whether claimant was entitled to a general bodily impairment versus four scheduled injuries. The Board's Order was not appealed and is final. Findings of past facts and past conclusions of law cannot be relitigated. The statutory interpretations that resulted in the ALJ's and Board's findings on the nature and extent of claimant's disability in the original award and Order are the law of the case.

The doctrine of res judicata also applies to final workers compensation orders and awards where the issue is not subject to review and modification. Respondent argues res judicata does not apply to the issue of nature and extent of disability. But respondent is seeking to relitigate past findings of facts. Whether claimant's permanent partial disability should be compensated as four separate scheduled injuries under K.S.A. 44-510d or as a general body disability under K.S.A. 44-510e was decided in the original Award and the Board's original Order. That Order is final. Therefore, in the absence of new evidence or a change in claimant's circumstances or condition, review and modification is not a procedure for respondent to relitigate the award of permanent partial disability compensation in the original Order.

CONCLUSION

Respondent has failed to prove that the Award of September 3, 2004, and the Board's Order of March 31, 2005, should be modified.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 23, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2008.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Douglas C. Hobbs, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge